

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking for the Purpose of
Amending General Order 156.

FILED
PUBLIC UTILITIES
COMMISSION
April 13, 2006
SAN FRANCISCO OFFICE
RULEMAKING 06-04-011

**ORDER INSTITUTING RULEMAKING TO
AMEND GENERAL ORDER 156**

I. Summary

We institute this rulemaking to amend General Order (GO) 156 regarding the process for verifying and determining the eligibility of women, minority, and disabled veteran business enterprises for utility procurement contract opportunities. Under the existing GO, these functions have been administered by the Commission, pursuant to Commission-approved criteria, under a contract with an outside clearinghouse. We amend the GO to allow us to authorize a utility-formed entity to operate the clearinghouse. If no utility-formed entity is created or authorized, the amended GO authorizes Commission staff to administer the clearinghouse internally.

II. Statutory Background

Starting in 1986, the California Legislature enacted a series of statutes to ensure that a fair proportion of total utility contracts and subcontracts for products and services are awarded to women, minority, and disabled veteran business enterprises (WMDVBE). (See generally Pub. Util. Code §§ 8281-8286.)

The purposes of these statutes are to (a) encourage greater economic opportunity for women, minority, and disabled veteran business enterprises; (b) promote competition among regulated public utility suppliers to enhance economic efficiency in the procurement of electrical, gas, and telephone corporations' (and their affiliates') contracts; and (c) clarify and expand the program for the utilities' procurement of products and services from WMDVBE enterprises.

(See § 8281(b)(2).)

GO 156, first adopted in 1988, sets forth Commission rules for implementing the statutory requirements set forth in §§ 8281-8286. GO 156 has been amended numerous times over the years, most recently by Decision (D.) 05-12-023 (December 15, 2005). An updated version of GO 156, reflecting all amendments through December 15, 2005, is set forth as Attachment A.

Section 3 of GO 156 establishes a clearinghouse "to audit and verify the status of WMBEs [women-owned or minority owned business enterprises], and to establish and maintain a database of WMDVBEs that is accessible to the Commission and to participating utilities." (Section 3.1, GO 156.) For years, the audit and verification functions have been performed by an outside vendor under contract with the Commission using guidelines approved by the Commission. Recently, the California Department of General Services (DGS) has informed the Commission that Government Code Section 19130 requires that work that state civil servants can perform should not be contracted out and that the WMBE audit and verification functions can be performed by state civil servants.

Commission staff has explored options for having state civil servants perform the audit and verification functions now provided by an outside vendor. After evaluating this option, as well as other approaches for the clearinghouse, Commission staff recommends accepting WMBE verifications issued by an entity

to be created, funded, and administered by certain of the major public utilities operating in California. The Commission proposes to amend GO 156 to adopt the staff recommendation.

III. Existing Procedure

Under existing GO 156, the Commission contracts with an outside vendor for the maintenance of a clearinghouse for the sharing of WMDVBE¹ identification and verification information. A firm seeking verification as a WMBE completes a verification form and submits it to the clearinghouse vendor. Applying Commission-approved criteria, the vendor verifies that the firm qualifies as a WMBE. Once verified, the firm is included in the clearinghouse database of other WMDVBE firms. Utilities may contract with a verified firm without having to independently verify its WMDVBE status. Firms are required to submit verification forms at least once every three years.

IV. Proposed Changes

Through amendments to Rule 3 of GO 156, the Commission proposes to authorize a new entity, formed by major Commission regulated California public utilities, to undertake the WMBE verification and audit program. Staff reports that five major public utilities have expressed their general willingness to create such an entity and adequately fund its activities to audit and verify the status of WMBEs. The verifications and audits would be conducted in accordance with Commission criteria.

¹ Both WMBE and WMDVBE are used in this order. The clearinghouse that is the subject of this order verifies WMBEs. The California Department of General Services (DGS) verifies disabled veterans' business enterprises. The clearinghouse data base lists both types of verified firms (WMDVBEs).

This proposal is advantageous since it transfers the cost and daily supervision of the WMBE verification program to a utility formed and financed entity. The Commission would continue to provide oversight of the program to ensure that it satisfies California law and Commission orders and requirements. The verification process would be available to any business enterprise seeking to participate in any California public utility's WMDVBE program. The database of verified WMDVBEs would be provided regularly to the Commission and would be available through the Commission's own web site. As is the case now, complaints about program operation could be appealed and ultimately decided by the Commission-but in a more expeditious fashion.

Public utilities that have preliminarily expressed their willingness to create a new entity to undertake the WMBE verification and audit program should so indicate in their comments on this Order Instituting Rulemaking (OIR) during the comment period provided in section VI of this order. These utilities are invited to describe in more detail the type of entity to be formed, how it will be funded, and how it will be administered. A joint proposal by two or more utilities is preferred. If the Commission adopts this approach in its final decision in this proceeding, Commission staff will work with the participating utilities to draft the details of the proposal for approval by a subsequent Commission decision or resolution.

In the event the public utilities do not form an entity to administer the WMBE verification and audit program, or the Commission withdraws its authorization of such an entity, the proposed changes to GO 156 allow Commission staff to establish and operate the clearinghouse internally.

The proposed amendments to Section 7 set forth an expedited appeals process to the Commission. This process is fashioned after a process recently adopted for citation appeals set forth in Resolution ALJ-187.² This process is available for business enterprises contesting clearinghouse verification decisions and for third parties challenging the verification of other business enterprises. The process is available whether the verification and audit function is provided by a Commission-authorized, utility-formed entity or by Commission staff. Because these complaints are not against utilities or other regulated entities, the Commission's formal complaint procedures are not available.

These changes require modification of Section 3, "Clearinghouse," and Section 7, "Complaint Process," of GO 156. The proposed amended versions of Sections 3 and 7 are set forth in Attachment B.

V. Other Options Not Adopted

Commission staff considered and rejected other approaches for securing WMBE verifications. One option was to rely exclusively on Caltrans for verification services. Caltrans expressed reluctance to perform these services, and its verification process may not be as expeditious as desired by the Commission and utilities.

A second option was to allow the utilities to perform their own verifications. This option was rejected because of the anticipated difficulty of numerous utilities maintaining uniform standards.

² Procedures for Appeal of Citations Issued to Household Goods Carriers, Charter Party Carriers, and Passenger Stage Corporations (Sept. 22, 2005).

A third option was to accept self-certification from a firm itself or to cease verification entirely. This option was rejected because of the inability to maintain uniform standards and the potential for fraud and abuse by firms not actually eligible to be treated as WMBEs.

A fourth option was for the Commission to accept verifications issued by other federal, state, and local governmental agencies, as well as specialized verification organizations, so long as the agencies' verification processes substantially conform to the criteria set forth in GO 156 and Code of Federal Regulations (CFR) title 49, part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." This option was rejected because of the variability in verifications that would likely come from different agencies, the burden of shifting utility-related verifications to other governmental agencies, and the difficulty of adapting the CFR criteria to WMBE programs designed for utility procurement contracts.

A final option was to have Commission staff perform all verifications. This option is not the preferred solution because of the cost of establishing a verification unit and the uncertainty of securing necessary funding to do so. The proposed amendments to GO 156, however, do allow Commission staff to perform the verification and audit function if a utility-formed entity is not created or authorized.

VI. Preliminary Scoping Memo

This rulemaking will be conducted in accordance with Article 2.5 of the Commission's Rules of Practice and Procedure. As required by Rule 6(c)(2), this order includes a preliminary scoping memo as set forth below.

This rulemaking is instituted for the purpose of considering whether to amend portions of GO 156 as set forth above.

Pursuant to Rule 6(c)(2), we preliminarily determine the category of this rulemaking proceeding to be quasi-legislative as the term is defined in Rule 5(d). We contemplate that this proceeding will be conducted solely through a written record, and that an order will issue on the merits based on the pleadings timely filed in this docket. Parties will have the opportunity to comment on the necessity of hearings, and we may re-evaluate both the categorization and need for hearings after review of the comments.

In accordance with Rules 6.3 and 6(c)(2), the proposed schedule is as follows:

Opening Comments (including responses to order)	30 days after rulemaking issued
Reply Comments	14 days after opening comments
Issuance of Draft Decision	14 days after reply comments

The proposed schedule may change and may be refined by ruling issued by the Assigned Commissioner or the assigned Administrative Law Judge (ALJ). Consistent with Pub. Util. Code § 1701.5(a) and Rule 6(e), we anticipate that the resolution of this proceeding will not exceed 18 months from the date of the scoping memo.

As required by Rule 6(c)(2), any party filing a response to this order shall state in its response any objections the party has regarding (1) the categorization of this proceeding as “quasi-legislative;” (2) the determination that there is no need for hearings; and (3) the preliminary scope and timetable for this proceeding as described in this order. Any party who believes that a hearing is required must, in its response, identify and describe (1) material issues of fact and (2) the evidence the party proposes to introduce at the requested hearing.

Any right that a party may otherwise have to a hearing will be waived if the party does not submit such information in its response.

Any person interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco (1-866-849-8390 or 1-415-703-2074) or in Los Angeles (1-866-849-8391 or 1-213-576-7055).

Following review of the comments and replies, the Assigned Commissioner will issue a scoping memo that finalizes the category, scope, and schedule of this proceeding. (See Rules 6(c)(2) and 6.3.) After the scoping memo issues, parties may file and serve an appeal to the Commission regarding the ruling on category. (See Rule 6.4.)

VII. Service of this Order and Service List for This Proceeding

This rulemaking will be served on the service list for Rulemaking (R.) 05-08-029, the most recent rulemaking concerning GO 156.

Anyone else wishing to be placed on the service list for this rulemaking should submit his or her request within 20 days of the mailing date of this order to the Commission's Process Office, State Office Building, 505 Van Ness Avenue, San Francisco, California 94102, with a copy to the assigned ALJ at the same address. Parties should reference this rulemaking number and state if they wish to be an appearance, state service, or information only. (An "appearance" means that the party will actively participate in this rulemaking by filing comments and otherwise. "State service" means the person is employed by the State of California. See discussion below concerning "information only.")

These parties should also include their name, the name of their representative (if any), their address, and telephone and facsimile numbers, and email address, unless a party states that no email address is available. A service

list will then be prepared and posted on the Commission's web site at www.cpuc.ca.gov as soon as practicable. Requests to be included on the service list made more than 20 days after this order is mailed must be sent to and approved by the assigned ALJ.

Those persons who do not want to be parties, and only want notice of the hearings, if any, rulings, proposed decisions, and decisions, may mail a written request to the Process Office at any time requesting that they be added to the service list for information only.

VIII. Ex Parte Communications

This proceeding is subject to Rule 7 which specifies standards for engaging in ex parte communications and the reporting of such communications. Pursuant to Rules 7(a)(4) and 7(d), ex parte communications will be allowed in this proceeding without any restrictions or reporting requirements until the assigned Commissioner makes an appealable determination of category. Following the Commissioner's determination, the applicable ex parte communications and reporting requirements shall depend on such determination unless and until the determination is modified by the Commission pursuant to Rules 6.4 and 6.5.

Findings of Fact

1. GO 156 sets forth a procedure for verifying the status of WMBEs and for maintaining a database of WMDVBEs that is accessible to the Commission and to participating utilities.
2. For years, the audit and verification functions have been performed by an outside vendor under contract with the Commission.
3. Recently, the California DGS has informed the Commission that Government Code Section 19130 requires that work that state civil servants can

perform should not be contracted out and that the WMBE audit and verification functions can be performed by state civil servants.

4. After exploring various options, the Commission proposes to accept WMBE verifications issued by an entity formed by major Commission regulated public utilities. Commission staff also would be authorized to perform these functions if a utility-formed entity is not created or authorized. These changes require amendments to GO 156.

Conclusion of Law

A rulemaking to amend GO 156 as set forth in the order should be initiated.

IT IS ORDERED that:

1. A rulemaking on the Commission's own motion into amending General Order (GO) 156 as set forth in this order is hereby initiated. The most recent, updated version of GO 156 is set forth as Attachment A.

2. The Commission's Process Office shall serve this rulemaking on the service list for Rulemaking (R.) 05-08-029. Other persons who wish to be included on the service list for this rulemaking shall send a letter to the Commission's Process Office, with a copy to the assigned Administrative Law Judge (ALJ), no later than 20 days from the mailing of this order, as further directed by this rulemaking. After this 20-day period, a service list will be prepared and posted on the Commission's web site as soon as practicable. Thereafter, requests to be included on the service list must be sent to, and approved by, the assigned ALJ.

3. Interested parties shall file and serve their comments to this rulemaking no later than 30 days after this rulemaking has issued, and reply comments no later than 14 days after opening comments are due, unless otherwise directed by the Commission, the Assigned Commissioner, or the assigned ALJ, in accordance with the Commission rules for filing and serving documents. Parties shall

include any response to this order with their opening comments 30 days after this rulemaking has issued.

4. Those California public utilities (regulated by the Commission) desiring to form a new entity to perform the WMBE verification and audit functions under specific Commission authorization shall so indicate in their comments on this Order Instituting Investigation during the comment period. These utilities should describe in more detail the type of entity to be formed, how it would be funded, and how it would operate. A joint proposal by two or more utilities is preferred.

5. As required by Rule 6(c)(2) of the Commission's Rules of Practice and Procedure, any party filing a response to this rulemaking shall state in the response any objections to (i) categorization of this proceeding as quasi-legislative; (ii) the determination that there is no need for hearings; or (iii) the preliminary scope and timetable for this proceeding.

6. Any party who believes that a hearing is required in this proceeding shall make that request in the party's response to this order. Any right that a party may otherwise have to a hearing will be waived if the party does not submit such request in its response.

7. The Assigned Commissioner and the assigned ALJ may issue further rulings concerning the schedule and management of this proceeding.

This order is effective today.

Dated April 13, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners